No. 11,028

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

NORTHWEST POULTRY AND DAIRY PRODUCTS COMPANY (an Oregon corporation), and C. W. NORTON, President,

Appellee.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

JURISDICTION.

This is an appeal by the Price Administrator from an order of the District Court for the District of Oregon (Honorable Claude McColloch, District Judge) dated December 2, 1944, denying the appellant's application to permit inspection of the records of the appellee, Northwest Poultry and Dairy Products Company (R. 26-27). Jurisdiction of the District Court was invoked under Title II of the Emergency Price Control Act of 1942—56 Stat. 29 et seq. 50 U. S. Code App. Secs. 921, et seq.—hereinafter referred to as the Act—as amended by the Stabilization Extension Act

of 1944 (58 Stat. 840). Notice of appeal was filed February 27, 1945 (R. 27). Jurisdiction to hear and determine the appeal is conferred upon this Court by Section 128 of the Judicial Code (28 U. S. Code 225).

STATUTES AND REGULATIONS INVOLVED.

Sec. 2 of the Act (50 U. S. Code App. Sec. 902) authorizes the Price Administrator, whenever in his judgment "the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of the Act, * * * (to) establish such maximum price or maximum prices as in his judgment will be generally fair and equitable, and will effectuate the purposes of the Act."

By Sec. 4 (a) it is made unlawful for any person to sell or deliver any commodity, or otherwise to do or omit to do, any act, in violation of any regulation or order under Sec. 2, or of any regulation, order or requirement under Sec. 202 (b).

Sec. 202 of the Act authorizes the Administrator to make investigations and obtain information which he deems necessary or proper to assist him in the administration or enforcement of the Act and regulation thereunder. The material provisions of Sec. 202 involved here are as follows:

> "SEC. 202. (a) The Administrator is authorized to make such studies and investigations, to conduct such hearings, and to obtain such informa-

tion as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person

under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

* * * * * * *

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege."

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such

person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Revised Maximum Price Regulation 269, as amended (7 F. R. 10708), was issued pursuant to the Act on December 18, 1942. This regulation establishes ceiling prices for the sale of certain poultry items named therein, including turkeys. Section 1429.4 reads as follows:

"§ 1429.4. Records and reports. (a) Every seller and purchaser subject to this Revised Maximum Price Regulation No. 269 making sales or deliveries or purchases of poultry items to the value of $200.00 or more in any one month, after December 21, 1942, shall keep for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942 remains in effect a complete and accurate record of each sale or delivery of poultry items, showing the date of purchase or sale, the name and address of the buyer and seller, the quantities, types, grades, weight classes of poultry bought and sold, the number of head of each type, grade, and weight class of poultry bought and sold, the type of sale made (delivered or nondelivered), and the price paid or received.

(b) (This subdivision requires shippers of poultry items to post within freight cars, etc., certain information regarding the poultry items shipped.)

(c) Every seller and purchaser subject to this regulation shall keep such other records in

addition to or in place of the records required in paragraphs (a) and (b) of this section and shall submit such reports to the Office of Price Administration as that Office may from time to time require or permit."

Section 1429.5 of the Regulation reads as follows:

"§ 1429.5. Evasion. Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

Regional Order G-93 (F. R. 9-5287) was issued on May 2, 1944. It is printed at length at pages 23-24 of the Record. Under its provisions purchasers (processors, wholesalers, etc.) of turkeys from growers were required to charge a certain specified amount for the service of "custom processing" of live turkeys in the Eighth Region which includes the State of Oregon. By an official interpretation of this regulation (set forth in full at pages 24-26 of the Record) charges for the processing service of less than the prices fixed in the order were regarded as attempts to evade Revised Maximum Price Regulation 269.

STATEMENT OF FACTS.

Appellee, Northwest Poultry and Dairy Products Company, is an Oregon corporation engaged in the business "of wholesaler, processor and purchaser of turkeys" (R. 5). It is the largest dealer in turkeys in the State of Oregon, and handles one out of every three turkeys in that state (R. 51), with an annual volume of business running to $4,000,000 in turkeys and $4,000,000 in allied products (R. 118). As a dealer in this commodity, the corporation was subject to the Act and to Revised Maximum Price Regulation 269 (hereinafter referred to as RMPR 269) issued by the Price Administrator pursuant to Section 2(a) of the Act. Under Section 202(b) of the Act the Administrator is authorized to require any person engaged in the business of dealing in any commodity to make and keep records or other documents and to require any such person to permit the inspection and copying of these records and documents as well as the inspection of inventories. RMPR 269 requires the seller to keep *for inspection* by the Office of Price Administration, certain records pertaining to the purchase and sale of poultry (Sec. 1429.4). A violation of the regulation is a violation of the Act (Sec. 4(a)).

On or about August 1, 1944, the appellant determined[1] that in the enforcement and administration of the Act, of RMPR 269 and of Regional Order G-93, an investigation was necessary to discover whether or not appellee had complied and was complying with the provisions of the Act and of said regulation and

[1]Supp. Tr. of Record, p. 341.

order. An investigation was commenced, in the course of which the appellee was requested to permit inspection and copying of the corporation's records of purchases, sales, and disbursements covering the sale and purchase of all turkeys purchased and sold by appellee between May 8, 1944 and August 10, 1944 (Supp. R. 342). It is admitted that the records were in the possession of the appellee (R. 5, line 6). Thereafter, a formal inspection requirement (Supp. R. 344-346) was duly issued and served upon appellee, whereby it was required to permit a representative of the Office of Price Administration to inspect all purchases and sales records and disbursement records covering the sales and purchases by the company of all turkeys between said dates, and to permit the copying thereof. Appellee declined to comply with this requirement (R. 160).

On September 19, 1944, the Administrator filed an application with the District Court for an order requiring the appellee to permit the inspection and copying of the sales and purchase records described in the inspection requirement (Supp. R. 340-349; R. 2-3). In response to the order to show cause, the appellee filed a return (R. 3-4) and an answer (R. 14-26). *The sole ground upon which the application for inspection was resisted was the alleged invalidity of the Administrator's Regional order G-93.* This appears both from the answer and return, and from the opening statement of the attorney for the appellee: "the reason that we are resisting the application for the examination of the records is that we contend that this order (G-93) is invalid on two principal grounds"

(R. 31). Simultaneously with its answer, the appellee filed, as plaintiff, an action for declaratory judgment asking the District Court to declare the Order G-93 and certain other regulations of the Price Administrator unconstitutional and invalid (R. 31-32). The Court ordered the Administrator's application for the inspection requirement and the respondent's action for declaratory judgment to be tried jointly (R. 64). After trial, the Court dismissed appellee's action on the ground that jurisdiction to review the validity of regulations issued by the Price Administrator was exclusively vested in the Emergency Court of Appeals by Section 204(d) of the Act. No appeal was taken from this judgment of dismissal.

With respect to the Administrator's application to inspect appellee's records, the Court entered an order denying the same and dismissing the cause. The order was based on the ground that "all of the information that is required herein was disclosed by defendant and its counsel during the trial of the said other case" (R. 26). The appeal herein is from this order.[2]

While no formal findings of fact were made below, the Court spoke its mind frequently throughout the trial, commenting freely on the evidence and what it considered to be the legal issues involved, and ad-

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[2]The record on appeal herein incorporates the transcript of evidence in the companion case in which the corporate appellee was plaintiff, since the two cases were tried together without much attempt to restrict evidence to the respective case to which it may have had relevance, and since the District Court expressly founded its reason for dismissal on the conclusion that the information requested by the appellant was disclosed during the trial of the companion case.

vanced numerous objections to the Administrator's application in addition to the ground finally assigned for its denial of the application. All of the contentions in opposition to the application to permit inspection were originated by the trial Court *sua sponte*.

Thus the Court implied that an expressly admitted violation and flouting of the regulation makes it unnecessary to inspect the violator's records (R. 177, 196); that the appellee, a corporation, could invoke the constitutional guarantee against self-incrimination in resisting inspection of the records (R. 197-199); that in applying for the order to compel appellee to comply with the inspection requirement, appellant was invoking the Court's discretion (R. 161) and that as a prerequisite to the exercise of such discretion the appellant had to satisfy the Court as to the existence of probable cause for believing that the Act had been violated (R. 164, 168-170).

The principal issue in the case is whether a person subject to the Emergency Price Control Act and regulations issued thereunder may be excused from complying with an administrative inspection requirement, reasonably limited in scope and clearly pertinent to the enforcement of the Act, merely because testimony offered by him in resisting the Administrator's application to enforce compliance is deemed by the Court to be a satisfactory substitute for the inspection of his records.

SUMMARY OF ARGUMENT.

Record-keeping requirements are the heart and foundation of price stabilization and control. To carry out these purposes, Congress clothed the Administrator with authority to inspect and copy the records required to be kept by persons subject to the Act. In RMPR 269, the Administrator duly exercised this authority by requiring persons subject thereto to keep records and to make them available for examination. The records which the Administrator sought to examine in this case were of that type. The information sought was reasonably limited in scope and clearly pertinent and relevant to the enforcement of the Act. The inspection requirement to which the appellant sought to compel obedience was therefore a lawful exercise of the Administrator's investigatory power, and appellee's persistent refusal to allow examination was wholly unjustified.

The fact that appellee testified that he had violated the regulation or order of the Administrator, far from being a proper ground for dismissing the application to enforce compliance with the inspection requirement, was cumulative ground for directing compliance. The Court's offer of this testimony to the Administrator in lieu of the inspection authorized by Congress, and its holding that the Administrator should be satisfied therewith, is an attempted usurpation of the Administrator's investigatory power and a wholly invalid exercise of the judicial function. The statutory and constitutional standards by which the right of inspection may be properly tested by the Court were duly met

and no objection was raised with respect thereto; the presumption of regularity which normally attends an administrative proceeding was neither rebutted nor overcome; and the Court had no facts before it upon which to base any discretion to refuse the statutory relief prayed for by the Administrator.

ARGUMENT.

I.

THE COURT BELOW ERRED IN EXCUSING APPELLEE FROM COMPLYING WITH THE INSPECTION REQUIREMENT. THE COURT'S BELIEF THAT APPELLEE'S TESTIMONY WAS A SATISFACTORY SUBSTITUTE FOR THE ACTUAL INSPECTION OF APPELLEE'S RECORDS BY THE ADMINISTRATOR WAS NOT A PROPER GROUND FOR DENYING THE APPLICATION.

The question presented in this case is whether the Price Administrator is barred from inspecting business records which a person subject to a regulation is required to keep, merely because that person has testified in a proceeding brought to enforce an inspection requirement, or in another cause, and the Court deems this testimony to be a satisfactory substitute for the inspection. The Act does not provide or even intimate that the Administrator's right to inspect may be defeated by the testimony of a party as to any facts sought to be elicited by the inspection, or that the Administrator may be compelled to accept any such testimony in lieu of the inspection. Yet, it is this very substantial proviso, an implied condition subsequent as it were, which the Court below attempts to read

into the Act. The provisions of the Act which give the Administrator authority to require the keeping of records and the right to examine them are as broad and free from limitation as language can make them. The Act authorizes the Administrator to make investigations and obtain information which he deems necessary or proper to assist him in prescribing any regulation or in the administration or enforcement of the Act and regulations issued thereunder (Sec. 202(a)). The Administrator is further authorized, by regulation or order, to require a person subject thereto, to make and keep records and permit inspection of them (Sec. 202(b)). No substitute for this inspection is provided or contemplated by the Act.

Without the untrammeled right to inspection of records required to be kept, the purpose of the Act would be easily frustrated. These purposes, and the construction to be given to Section 202 of the Act, are set forth by this Court in *Bowles v. Glick Bros. Lumber Co.,* 146 F. (2d) 566, certiorari denied June 11, 1945. The Court there said (pp. 570-571):

> "It is thus seen that dealers are required by the Act to keep such informative records as the Administrator may direct and to permit the Administrator, upon request, to inspect and copy them. These requirements are an essential part of the Congressional scheme of price stabilization and control. It is hard to see how the purposes of this vital wartime legislation could be achieved without them. To effect the end desired Congress clothed the Administrator with regulatory and investigatory powers commensurate with his re-

> sponsibilities, arming him both with authority to inspect and with the power of subpoena. The regulations on the subject are in harmony with the statute. * * *''

This language was quoted and followed in *Bowles v. Insel,* 148 F. (2d) 91, 93 (C.C.A. 3rd 1945). Similar views were expressed by the Court of Appeals for the District of Columbia in *Cudmore v. Bowles,* 145 F. (2d) 697 (App. D. C., 1944), cert. denied, 65 S. Ct. 588; *acc., Bowles v. Rothman,* 145 F. (2d) 831 (C.C.A. 2d 1945).

In denying the Administrator's application to enforce compliance with the inspection requirement, the District Court based its decision on the sole ground that *it appeared to the Court that* "all of the information that is required herein was disclosed by the defendant and its counsel" in the trial of another case (R. 26). Thus the Court concluded that it had the right to pass on both the character and quantum of the information sought by the Administrator and that it had the further right to impose on the Administrator the testimony of appellee in lieu of the inspection of the appellee's original records and documents.

This decision by the Court was wholly unauthorized. The basic grant of authority for investigations is found in Section 202(a) of the Act, which authorizes the Administrator "to make such studies and investigations and to obtain such information *as he deems* necessary or proper to assist him in prescribing any regulation or order under this Act or in the adminis-

tration or enforcement of the Act and regulations, orders, and price schedules thereunder". The language compels but one conclusion—that the Court below could neither prescribe for the Administrator an alternative method for obtaining the information nor determine what information must satisfy the Administrator. The information which Congress authorized the Administrator to secure was that which he deemed necessary and not that which the learned Court below deemed necessary.

The arrogation by the Court of such functions to itself constituted a usurpation of the Administrator's authority in an area peculiarly and specifically confined to the Administrator by Congress. Such usurpation has been repeatedly condemned even when courts were called upon to review conclusions drawn by administrative agencies from conflicting evidence: *Swayne & Hoyt v. U. S.*, 300 U. S. 297, 304; *Manufacturers Railway Company v. U. S.*, 244 U. S. 457, 487, and the numerous decisions following these cases.

> "If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so.": *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80, 94.

The judicial function is exhausted when there is found to be a rational basis for the *conclusion* of an administrative body: *Montana Power Co. v. Federal*

Power Com., 112 F. (2d) 371 (C.C.A. 9th, 1940); *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, 146, and cases there cited. *A fortiori,* the Court below transgressed its judicial function when it assumed to impose on the Administrator specific information as a basis for arriving at his conclusion.[3]

The Court's order in the instant case evidently stemmed from an entire misconception of the administrative investigatory function and the respective and complementary functions of courts and administrative agencies. The Court treated the application for enforcement of the inspection requirement as an application for discovery in an action pending before the Court ("I know that (it) is discovery": R. 164; see also pp. 168, 196).

But the Administrator was not in the position of a party seeking discovery in a litigated case before the Court. He was attempting to carry on an investigation in the exercise of a power specifically delegated to him by Congress. The investigation was part of a legislative and executive function which could not be interfered with by the Court. Cf. *National Labor Relations Bd. v. Waterman S. S. Corp.*, 309 U. S. 206, 208-9. As was stated by Judge Learned Hand in *McMann v. Securities and Exchange Commission,* 87 F. (2d) 377, 379 (C.C.A. 2nd, 1937):

> "The attempted investigation may indeed lack legal sanction * * * and the officer who conducts it

[3]It has also been repeatedly held that where Congress has delegated to an administrative authority a certain field of governmental activity, the Courts will not interfere until the administrative proceedings have been concluded. *U. S. v. Kauten*, 133 F. (2d) 703, 706 (C.C.A. 2d 1943), and cases there cited.

> will then stand no better than any other interloper; but if it be duly authorized, it is no more subject to obstruction than judicial proceedings."

Nor could the Court below properly turn this summary proceeding to enforce a subpoena into a lawsuit to determine questions which must be decided by the Administrator in the course of his investigation. In *Martin Typewriter Co. v. Walling,* 135 F. (2d) 918 (1943), the Circuit Court of Appeals for the First Circuit affirmed an order enforcing an administrative subpoena, quoting with approval the following language from the memorandum opinion of the Court below (at p. 919):

> "This is an application to enforce a subpoena in what appears on its face to be an authorized and orderly investigation, and I do not feel justified in turning it into a lawsuit to decide a question which must be decided by the administrator in the course of his investigation, and which, if decided wrong, can be corrected later in a proceeding to enforce the order of the administrator."

The Court below believed that unless it treated the application as one for discovery, it became a mere rubber stamp (R. 190). It is submitted that in this conception of its role the Court was obviously in error. The function of the Court in connection with the enforcement of an administrative subpoena is anything but ministerial and automatic. The Court has important judicial functions to perform in testing the Administrator's right to a subpoena, by applying certain well-defined standards for the protection of the

individual's constitutional rights. Thus, in a proper case a witness may be protected against self-incrimination; cf. *Boyd v. U. S.*, 116 U. S. 616. The administrative subpoena might be set aside because it is unduly vague and unreasonably oppressive; cf. *Hale v. Henkel*, 201 U. S. 43; *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298. The Court may find that the subpoena was not issued by the person vested with the power; cf. *Cudahy Packing Co. v. Holland*, 315 U. S. 357; or, finally, that the evidence sought is not germane to any lawful subject of inquiry.

None of these or any other valid defenses were or could have been urged here. In the instant case the materiality of the documents is unquestioned and they are sufficiently and clearly described in the inspection requirement. The inspection requirement was reasonably limited in scope and called only for documents relevant to the injury (cf. *Walling v. Ralbal Corp.*, 135 F. (2d) 1003 (C.C.A. 2d, 1943); *Brown v. U. S.*, 276 U. S. 134, 143). Because of the well-established presumption of regularity attending acts of administrative agencies, the mere fact that the Administrator issued an inspection requirement is sufficient to show that he deemed the information sought here necessary or proper to aid in the administration and enforcement of the Act and that he has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent (*Bowles v. Glick Brothers Lumber Co., supra*, 146 F. (2d) at p. 571; *Mississippi Road Supply Co. v. Walling*, 136 F. (2d) 391, 394 (C.C.A. 5th), cert. denied, 320 U. S. 752; *McGarry v. Securi-*

ties & Exchange Commission, 147 F. (2d) 389, 393 (C.C.A. 10th, 1945)). Appellees have, of course, utterly failed either to rebut or overcome this presumption: as was shown above (Statement of Facts), they resisted the application for inspection solely on the ground of the alleged invalidity of the regulations.

The inspection requirement "should have been obeyed without recourse to the Court": *Cudmore v. Bowles,* 145 F. (2d) 697, 698 (App. D. C., 1944), cert. denied, 65 S. Ct. 588. The Court had no facts before it upon which to base any discretion to refuse enforcement of the inspection requirement.

II.

IN ANY EVENT, THE INFORMATION DISCLOSED BY APPELLEE DURING THE HEARING WAS NOT "ALL OF THE INFORMATION REQUIRED" BY THE ADMINISTRATOR.

Not only did the Court below grossly misconceive the nature of the judicial function he was called upon to exercise in acting upon appellant's application: he also failed utterly to comprehend the objectives sought to be accomplished by the Administrator in requesting appellee to comply with the law by permitting the inspection of the "quasi-public" records under its control. As disclosed by the very language of Section 202(a) of the Act, the Administrator utilizes the information obtained by such inspections (1) in prescribing regulations and orders pursuant to the congressional mandate, (2) in the administration of such orders, and (3) in the enforcement of the Act and the

various regulations, orders, and price schedules issued thereunder. The tremendous task of fixing the prices of numberless commodities subject to price control so that they will be "generally fair and equitable" in the complex workings of our war economy and of enforcing a program for that purpose cannot be accomplished unless precise and comprehensive information is made readily available.

With these general objectives in mind, an examination of the record below shows no support whatever for the Court's conclusion that "all of the information that is required herein was disclosed by defendant and its counsel during the trial of said other case." Virtually the only information supplied was the admission that the company was doing business in contravention and defiance of the regulation. The exact amount of sales made, the dates thereof, the prices for which it bought and sold its turkeys, etc.—all was left to speculation. Not a single document relating to the operation of appellee's business was produced, nor any concrete evidence of any sort. The only specific violation admitted by the appellee was the payment to growers of turkeys of a higher ~~proc~~ price by per processing charge than was permitted under the regulation (R. 167.)

The Administrator, for example, desired to discover the price for which appellee sold turkeys which were rejected by the Army. The District Court, however, did not deem this information relevant for the reason that it "comes under the heading of *de minimis non curat lex*" (R. 182). Yet the annual volume of these

sales amounted to a possible $80,000.[4] Also, the Administrator advised the Court that he desired to investigate the records of appellee to discover details regarding its export sales (R. 184-185) and sales to the Army and Navy. The Court did not "deem it necessary", however, stating that "I would not think that in a large, notorious transaction like that it would be much of a field for investigation for evasion" (R. 190).

Congress has placed several sanctions in the hands of the Administrator, who may determine which particular sanction should be invoked, the decision depending upon the particular facts involved in each case. For example, a treble damage action might be instituted pursuant to Section 205(e) of the Act, or a suit for injunction could be brought (Section 205(a)), or a license suspension action commenced under Section 205(f)(2), or the case could be referred to the United States Attorney for appropriate criminal action. The inconclusive "evidence" which the Court below "developed" (R. 196) was not only useless to the Administrator for purposes of prescribing and administering the regulations, but in addition failed to provide an adequate basis upon which an intelligent selection of the proper sanction could be made. Furthermore, the lower Court's suggestion (R. 199-200) that the government should institute an action, the sole basis of which is an admitted violator's oral statement, without first verifying that statement by an examina-

[4]Possibly two per cent (R. 182) of a $4,000,000 business (R. 118).

tion of his records (which he is required to keep for this specific purpose), is, to say the least, unique.

The import of the lower Court's decision is startling. It amounts to this: *admitted violators of the Act are exempt from its provisions relating to examination and inspection of documents.* It may be doubted whether the Court below intended to make a holding of this kind. However, the conclusion is unescapable. The Court actually dismissed the Administrator's application *because* the person sought to be investigated admitted being in violation of the Act.

III.

THE OTHER GROUNDS FOR DENYING THE APPLICATION STATED BY THE COURT BELOW IN THE COURSE OF THE TRIAL ARE INAPPROPRIATE.

In the strange trial which took place below,[5] the only contest on the issues presented by the application was that between the Administrator and the Court, rather than between the parties to the proceeding. The appellee rested its entire defense on the invalidity of the regulations. All the contentions with regard to the propriety of the application for inspection were ad-

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[5]The Court's jurisdiction was invoked under the Act for the specific purpose of testing the Administrator's right to an inspection of appellee's records. The Court turned the trial of this issue into an administrative investigation designed to "develop" testimony in lieu of such inspection, with the Court himself holding the investigation, asking all the questions, and completely taking over the conduct of the case for appellee. Cf. *Martin Typewriter Co. v. Walling,* 135 F. (2d) 918, 919 (C.C.A. 1st, 1943).

vanced by the Court on its own initiative. These contentions will be briefly noted.

The Court spoke freely regarding the appellee's right to protection against self-incrimination (R. 197-199). However, the inspection requirement related only to the records of the corporate appellee, and only to those records which it was its duty to keep under the Act and regulations. These were quasi-public records which appellee may be compelled to produce even though their contents may tend to incriminate it, and the constitutional privilege against self-incrimination does not extend to such records: *Bowles v. Glick Bros. Lumber Co.,* 146 F. (2d) 566 (C.C.A. 9th, 1945), cert. denied June 11, 1945; *Bowles v. Cudmore,* 145 F. (2d) 697 (App. D. C. 1945), cert. denied, 65 S. Ct. 588; *Bowles v. Insel,* 148 F. (2d) 91 (C.C.A. 3rd, 1945); and in any event, the claim of privilege is only available to a natural person and not to a corporation: *U. S. v. White,* 322 U. S. 694, 64 S. Ct. 1248 (1944).

The Court also definitely and repeatedly ruled[6] that the Administrator had to establish probable cause for believing that a violation occurred, as a prerequisite to the right to enforce inspection of the records. This, of course, is not the law: *Bowles v. Glick Lumber Co., supra,* 146 F. (2d) 566 at p. 571; *Bowles v. Insel, supra; Bowles v. Cudmore, supra; Bowles v. Rothman, supra.*

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[6]When counsel for appellant stated that it was not necessary to show any facts indicating probable cause, the Court replied: "That would be between you and me and the appellate court" (R. 170). At pages 167 to 169, the entire colloquy between the Court and counsel for appellant relates to the Court's insistence on facts indicating probable cause. See also pages 188-189.

CONCLUSION.

It is respectfully submitted that the order of dismissal should be reversed and the cause remanded with instructions to grant the relief requested by the Administrator in these proceedings.

Dated, October 5, 1945.

Respectfully submitted,

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